

With the greatest respect, I cannot agree...: An investigation into the discourse of dissenting in selected Malaysian judicial opinions

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ABSTRACT

Modern judicial opinions are by tradition, a reflection of hundreds of years of history and tradition. Judges usually give their decision and order verbally in court, and legally significant and important judgments notably from the higher courts, are then published in law reports and become the substance of common law. 'Dissent' is the written expression of a judicial opinion that results in the court not arriving at a unanimous decision. Hence, the dissenting judge will have to state his disagreement by focusing on the issue(s) of law before proceeding to provide an explanation. Literature has shown that dissenting opinions are not a feature of all legal jurisdictions nor are they presented in the same way. This paper aims to discuss the discourse of 'dissenting' from an analysis of selected Malaysian judicial opinions. In this respect a mixed-method approach was employed to gather the data, while data analysis and the linguistic features were drawn from Trosborg's (1997) text typology. The main findings reveal that modality, adverbials as well as context-specific structures alluding to adherence and mutual respect, are employed to temper the emotive tone of the judges. Interestingly however, and contrary to literature, non-adherence to such practice has also been located. The question is, is such a position ideological?

Keywords: adverbs, adverbials; courtroom discourse; dissent; judicial opinion

INTRODUCTION

Against the backdrop of the many events that have colored the Malaysian judiciary, which arose out of the '1988 crisis' (Salleh Buang, 2007), interest and awareness of the functions of the third organ of the administrative has increased. An article that appeared in the *Malaysian Insider* (an Internet news portal that claims to publish 'unvarnished news from around the world') on the 10th of February 2010 entitled *The Damning Lack of Dissent* by Fahri Izzat, is testament to this. True to the rather contentious title, the writer, a lawyer-cum-blogger-cum-legal activist, lamented the lack of dissenting opinions in current Malaysian appellate judgments. That article adopted a legal-critique flavour arguing for a 'braver bench' which it claimed, if not present, will inevitably retard the development of the law in Malaysia.

This paper, however, will not take the legal route but will instead attempt a legal-linguistic approach to provide an understanding of how an important feature of courtroom discourse, the 'written word' of the proceedings, or otherwise known as judicial opinions, is realized. However, this is not a genre analysis of the appellate case report, but rather a focus on the dissenting opinion and the linguistic strategies employed by judges as they write their departure from the majority decision. As law is an interpretation of rules by judges, the paper will invariably uncover the covert use of language as judges wield their power and unveil their

stance. This unveiling is significant because Malaysia is a country that practices the rule of law and since judicial opinions are a source of law, in the words of Lebovits, “One way to judge judges is to read their opinion” (2006, p. 1).

LAW, CASE LAW AND JUDICIAL OPINION

Law can be defined as ‘rules of conduct,’ or a set of rules regulating conduct, the breach of which is the application of sanctions. In Malaysia, the principal sources of law are customary law, Islamic law (Syariah), English law (common law and equity) and the statutes or Acts of Parliament.

Case law is a legacy of the English common law where judges mete out justice through judicial precedent and the doctrine of *stare decisis*. Judicial precedent means that judges will seek a precedent or a leading case for their argumentation or reasoning. The doctrine of *stare decisis* on the other hand, means that the *ratio decidendi* or the principle(s) of law must be documented and this becomes case law. So judges first give their decisions verbally in court and later these judgments are written down. Significant judgments from the high courts and all judgments from the appellate courts are then published in law reports (Gibbons, 1994; Tiersma, 1999). This focus on the written word was finalized in the United States of America in the eighteenth century when “judges systematically issued written opinions” (Tiersma, 1999, p.37). In the United Kingdom and the United States of America, the books containing such reports are known as reports; but in Malaysia the two leading reports are the Malayan Law Journal and the Current Law Journal.

What is a judicial opinion? In common law adversarial tradition, judges are trained as advocates and they must listen to the evidence adduced in court from which they then construct and balance to arrive at the truth. This expression of what the law is to a judge, is a judicial opinion and “addresses two matters: result and reason” (Belleau & Johnson, 2008, p.58). A judicial opinion, or otherwise known as a case report, is a genre (Bhatia, 1983) and usually adopts a formal tone. To this end, Tiersma (1999, p.139) adds,

while it is “supposedly ‘objective’ rather than ‘persuasive’, a judge usually aims to persuade the reader that his decision was correct, but the objective tone suggests that the outcome is the only rational conclusion in light of the law and the facts.

Nevertheless, Tiersma (1999) has also found that judges do vary their tone and form and this includes the use of humor, poetry and metaphor. While humor is generally unacceptable (Prosser, 1952 in Tiersma, 1999) poetry and metaphor have their followers. Notwithstanding how an opinion is written, it must however, appear to be impartial, and Gibbon (1994) opines that judgments are supposed to have an individual tenor. On this point, and when dissenting, Tiersma (1999, p.140) states, “Judges give themselves more stylistic latitude in dissenting opinions.” He then proceeded with two examples. In the first, the dissenting judge in a Supreme Court case that declared the act of burning the American flag was protected free speech, sang the first verse of the national anthem in his dissent. In the second, when it was held by the Pennsylvania Supreme Court that Henry Miller’s *Tropic of Cancer* was not legally obscene, the dissenting judge famous for being an acerbic dissenter (Tiersma 1999, p.140), employed the image of filth with the metaphor of an open sewer and a collocation of words that depict foul and filth to criticize the majority decision.

Interestingly, judicial reasoning is evolved through syllogism and hence a number of judges may come to the same conclusion, albeit different routes; or entirely different conclusions. As such, in appeal cases, if there are three or five judges, there can be as many judgments or opinions. So, when a case is heard in an appellate court with a coram of 3, 5, 7, the decision can be unanimous or non-unanimous, i.e. majority.

Judicial disagreements however, are of two types: concurring or dissenting. To concur means to agree, but a concurring opinion is a form of judicial disagreement where a judge, who writes concurring reasons arrives at the same decision as the majority, but provides a different rationale or reason. On the other hand, dissent is the written expression of judicial disagreement, in an appellate court that is not unanimous in its judgment. According to Fahri Azzat (2010, p.1), a dissent has five functions, and they are to help the reader

- i. understand the meaning and implications of the majority opinion;
- ii. predict how justice will come out in future cases;
- iii. see the limits of majority holding;
- iv. see where the ‘fight’ was
- v. react

While dissent is a disagreement, it is not quarrelsome disagreement, as alludes Laffranquela (2003, p.173). In common law countries, the dissenting opinion will quickly become a completely normal part of the decision-making process. It is accepted that all judges cannot be of the same opinion in collegial decision-making, therefore the openness of the administration of justice includes the publication of the dissenting opinion.

Within a similar common law jurisdiction, the importance of dissent is alluded by Khanna J, of the Supreme Court of India. A leading habeas corpus case (*Additional District Magistrate, Jabalpur v. Shivakant Shukla* AIR [1976] SC 1207) states:

As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the Court to have been betrayed.

Dissenting can thus be seen as a ‘necessary evil’ in the carriage of the due process of law. Hence, despite Solan’s (1998) belief that “judges usually care deeply about making the best decision they can, and about conveying their decision in a manner that makes the decision appear as fair as possible to the parties, and often to the public” (p. 1), the question is, is this always true?

LITERATURE REVIEW

In the *Introduction* of *The Handbook of Forensic Linguistics*, Coulthard and Johnson (2010) fittingly put an opening quote from Halliday that states, “Language is as it is because of what it has to do” (1973, p.34). Nearly forty years down the road, the quote still rings true. The use of

language in the courtroom has been increasingly studied and developing from a sociolinguistic inquiry, it has increased in width and depth embracing the disciplines of linguistics, law, criminology and sociology. The birth of forensic linguistics with a professional association formed in 1993, has also given further impetus to the work.

The work on judicial dissent is an interesting mix of spoken and written discourse on the one hand, and the law and language, on the other. Spoken legal discourse has been well researched notably in counsel-witness interactions from Atkinson and Drew's (1979) seminal work to O'Barr's (1982), Maley (1991), Gibbons (1994) and Tiersma (1999) to the more recent Cotterill's (2007) close analysis of the O.J. Simpson trial, and Noraini Ibrahim (2007) among others. On written legal discourse, the focus has been on interpretations of rules and legislations, genre of judgments (Bhatia, 1987; Maley, 1985), Trosborg (1995) on contracts, as well as Solan's (1993) *Language of Judges*, which enquires into "how and why judges write about the structure and meaning of language to justify their decision". Solan (1993) however, he did not indulge in the language of dissent.

IS A NON-IDEOLOGICAL JUDGE A MYTH?

Philips (1998) states that judicial behaviour has always been an area of interest to social scientists notably in variations in sentencing practices. Her ethnographic research, which began "as an anthropological study of judicial behaviour in an American trial court... became an analysis of the way ideological diversity is organized in legal discourses" (1998, p. xi). Within the hierarchy of the US legal system, Philips found that the trial judges she observed

acknowledged that they had become judges through a process influenced by party politics and political ideologies, and they acknowledged having political ideologies themselves. But they did not feel that the political ideologies should influence what they did in the courtroom. (p. xiii)

Philips (1998) went further to say that the position of these trial judges were consistent with the fact that they were trial judges and they only implement the law and not make law as the "law is made by the state legislature and the appellate court" (p. xiii). Drawing a parallel from this, Philips adds, "... it is reasonable to expect appellate court judges to be 'ideological' in the political sense of conservative versus liberal, and to expect this to influence the law they make..." (p. xiii). What is also enlightening is her finding on the ideological differences between the record-oriented judge versus the procedure oriented judge, which were found to be the result of their selection and elevation to the bench: by election or appointment. At this juncture, it might be relevant to ponder if such ideological bearings are overtly present in the Malaysian courtroom and manifested in the judgments meted out.

As language behaviour signals ideology, Finegan (2010, quoting from Savage 14 May 2009) recounted an instance of opposition to an appointment of Judge Sonia Sotomayer as proposed member of the United States Supreme Court. Despite her qualifications, her nomination was 'marred' by a statement she had given eight years prior to the event, when she had said,

I would hope that a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who hasn't lived that life.

The good judge has revealed possible gender and ethnic biasness which may have been problematic to the selection committee and it contrasted starkly with one credited to Justice Sandra Day O'Connor, the first woman appointed to the US Supreme Court. If Sotomayer has alluded to her ethnicity and gender, O'Connor was quoted as saying, ". in deciding cases, a wise old man and a wise old woman would reach the same conclusion (Finegan, 2010, p.67), thus propagating the essence of justice, namely impartiality and the appearance of it (Chan, 2007).

It is thus interesting to see what ideological manifestations will be uncovered and what may be the impetus for such ideological leanings.

DISSENT

While there is a dearth in the study of the language of dissent, the impact of dissenting has not been neglected. Primus (1998), for instance, claims that dissents have the potential to be canonical, and this means that appellate courts must, where necessary be active in dissenting, or at least in concurring. Laffranque (2003) on the other hand, has found that dissenting is crucial for judicial independence but warns that the misuse of it may lead to high risk. It is interesting to note that much of the concern stated in other jurisdictions are parallel to that of local works as in Chan (2007) and Fahri Azzat (2010).

In relation to ideological stance and specifically, gender and judgment, Belleau and Johnson (2008) found that Canadian female judges dissent more than agree, to the extent that some of them have been called the 'Great Dissenters'. However, the authors claimed that while "The statistics are provocative, [they] do not provide straight forward answers about gender and judging (p. 57). The absence of such correlation is apparently because there is little to show the "substance of disagreement" (p. 66). Hence, for each dissent, a very close text or qualitative analysis must be carried out.

On the linguistic markers of dissent, Belleau and Johnson (2004, p. 178), describe such markers as those that "draw deeply on the persuasive resources of language" (p. 178). In conjunction with this, Brennan (1999), states that judges use language to 'appeal to the future,' 'capture the brooding spirit', or 'sow seeds for future harvest' besides articulating "alternative vision of 'the real', re-describe the facts, re-draw the boundary between the legal and the social, and challenge how we think about law itself " (Belleau & Johnson, 2004, p.178).

In order to identify the markers, a good starting point is Trosborg (1997), as seen in Figure 1 below

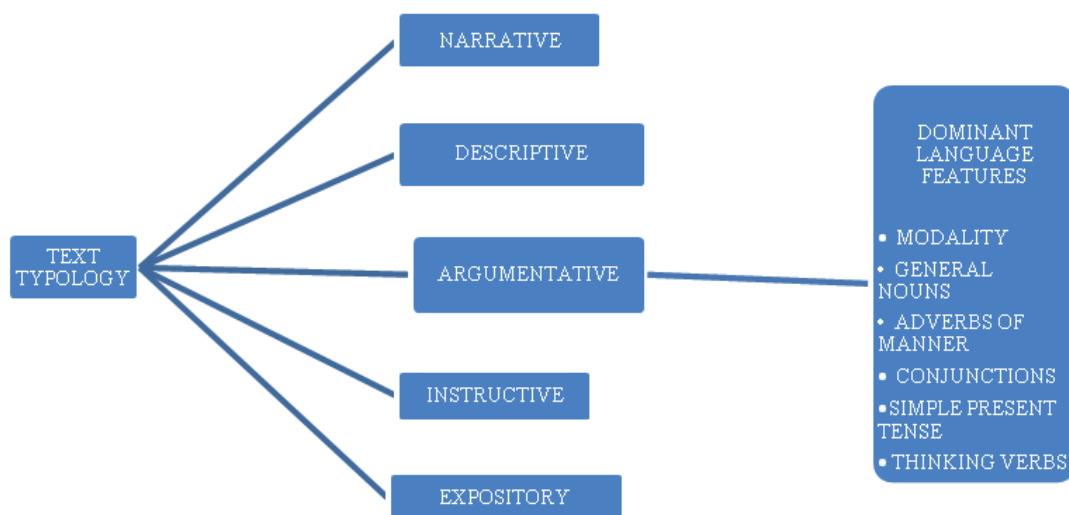


FIGURE 1: TROSBORG'S (1997) TEXT TYPOLOGY

The typology shows a classification of five types of texts: narrative, instructive, argumentative, expository and descriptive. Of the five, Mochales (2008) claims that argumentation mainly occurs in dissenting opinions and here the dominant language features observed are as follows: modality, thinking verbs, general and abstract nouns, adverbs of manner, simple present tense and conjunctions.

While Belleau and Johnson (2004) cite the use of rhetorical structures like ‘evidence was presented’ or ‘nothing before the court indicates’ in cases heard in Canada, Finegan (2010), enquires into the “linguistic expression of judicial attitude” (p. 67) from 2008 opinions of the United States and California Supreme Courts. The study shows that judges and notably, appellate judges do not “mute the intended expression” (p. 67). Hence, Finegan (2010) document the use of adjectives (predicative and attributive), verb choices and adverbials as well as adverbs as expressions of attitude and emphasis. The study further reveals that adverbs and adverbials form the bulk of expressions of attitude and expressions. While adverbials add to the content, adverbs do not as the following examples from Finegan (2010, pp. 72-73) demonstrate:

1. Not surprisingly, the parties vigorously dispute the waiver issue, and it sharply divided the Court. (It should not surprise us that...).
2. But when discussing the words, the Court simply ignores the preamble. (But when discussing the words, the Court ignores the preamble).

Finegan has also categorized several adverbials as having different functions like emphasis on manner for instance, the use of *of course*, *naturally*, *obviously*, *clearly*, which may be used to enhance weak propositions and as such, should be used judiciously. Finegan’s study also alludes to Long and Christensen (2006) whose findings show that in non-unanimous decisions, intensifiers have been widely used and the dissenting judges were “by far the worst offenders” (p. 76).

To conclude this review, it can be stated that while the impact of dissent cannot be denied and is gaining much recognition, the same cannot be said of studies that are to examine the very ‘tools’ that are used to realize the dissent. As there are no local studies to allude to,

the literature afforded from the west makes it very interesting because the use of language is context-driven, thereby raising two issues. First, are the same linguistic features that are documented in the west used in the Malaysian courtroom? And second, are these feature employed to give the same attitudinal meaning given the premise that our worldviews ‘ought’ to be different? This is yet another gap in knowledge that may be bridged.

METHODOLOGY

This paper employed a mixed-approach in its design. The qualitative approach is an analysis of human thought and perception, and Strauss and Corbin (1990 as cited in Hoephel, 1997) claimed that this approach can be employed to better understand any phenomenon about which little is yet known. For ease of identification of features, a corpus linguistic approach was used as it was speedier. This method was employed by Cotterill (2007) in analyzing the trial of the famous ex-American footballer, O.J. Simpson, among others.

DATA SELECTION

The case reports selected were sourced from the Lexis Nexis database for the Malayan Law Journal with a focus on cases heard from 2000-2010. The search yielded 35 cases with dissenting opinions, but for the purpose of this study that enquires into an ideological stance, three cases were selected. The first two cases involved the same parties, Lina Joy vs Majlis Agama Islam Wilayah Persekutuan & Ors., heard on appeal firstly at the Court of Appeal and finally at the Federal Court. It was an apostasy case with the key issue being an appeal to change the appellant’s name in her National Registration Identity Card (NRIC), and to drop Islam, as her religion. The third case is another civil case, Chong Swee Huat & Anor. V Lim Shian Ghee [2009].

The cases were chosen because of their intrinsic value: Lina Joy was controversial in Malaysia due to the main issues; and Chong Swee Huat due to the dissenting judge, Datuk Zainon Ali, a female judge and one out of three in 2009, from a coram of twenty two.

The key issues as presented to the appeal courts are as follows.

Case Report 1: Lina Joy V Majlis Agama Islam Wilayah Persekutuan & Ors
[2005] 6MLJ 193 (Court of Appeal, Putrajaya)

Panel of Judges	Type/Place of Court	Dissenting Judge
1. Gopal Sri Ram,	Court of Appeal (Putrajaya)	Gopal Sri Ram
2. Abdul Aziz Mohamad		
3. Arifin Zakaria		

The facts of the case in brevity are as follows. The appellant, Azalina bte Jailani, who was born a Muslim, had baptized as a Christian and wanted to change her name first to Lina Lelani and later to Lina Joy. This required for a name change in her NRIC. She therefore applied to the National Registration department (NRD) to have that done and to remove the word ‘Islam’ from her NRIC. When the case was first heard it was initially a constitutional issue but on closer perusal and with the agreement of the parties, the Court of Appeal decided to abandon the constitutional issue and focused on the administrative issue. Hence, the issue that was heard was whether the NRD was right in law in rejecting the appellant’s application under

Reg 14 of the National Registration Regulations 1990 to have the statement of her religion as ‘Islam’ deleted from her NRIC and in requiring a certificate and/or order from the Syariah Court.

By majority, the Court of Appeal answered in the affirmative.

Case Report 2: Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain
[2007] 4MLJ 585 (Federal Court , Putrajaya)

Panel of Judges	Type/Place of Court	Dissenting Judges
1. Ahmad Fairuz Sheikh Abdul Halim	Federal Court	
2. Richard Malanjun	(Putrajaya)	Richard Malanjun
3. Alauddin Mohd Sheriff		

The appellant sought for leave to appeal to the Federal Court arising from the answer by the majority of the Court of appeal. Para 49 of the case is as follows:

Para 49: When hearing of the appeal proper began learned counsel for the parties herein initially agreed to approach the matter purely from the administrative law aspect. However, upon being allowed to express their views during the hearing learned counsel for the various interested non-governmental bodies appearing on watching brief raised some constitutional issues which the Appellant and Respondent agreed to skip earlier on. Hence in fairness to the appellant and respondents this court allowed their learned counsel to submit on those issues to reply.

CASE REPORT 3: Chong Swee Huat & Anor. V Lim Shian Ghee
[2009] 3 MLJ 665 (Court of Appeal, Putrajaya)

Panel of Judges	Type/Place of Court	Dissenting Judge
1. James Foong	Court of Appeal	
2. Zainun Ali	(Putrajaya)	Zainun Ali
3. Vincent Ng		

This is a civil case on tort for damages arising out of libel. This issue was whether special damages was proved and whether award of aggravated damages was proper when defendants had expressly apologized within period requested by plaintiff. The dissenting judge, Zainun Ali was of the opinion that in the face of the withdrawal of the impugned words and apology by the defendant, the demand for further apologies and the sum of RM980, 000 by the plaintiff were unjustified and could ironically be said to be actuated by malice. What was crucial was at the time of his comments, the defendant honestly believed it to be true. The plaintiff in this connection failed to establish that the defendant was actuated by malice when he made the said comment. In the circumstances, the learned trial judge had erred in awarding the plaintiff the sum of RM980, 000 as special damages, when the plaintiff had led no evidence on special damages. Once the cases were downloaded, each case was read in its entirety and then the dissenting judgments were located and perused carefully.

DATA ANALYSIS

As the researchers read through the entire opinion, linguistic markers of stance and attitude were identified and highlighted. Here, adverbs and adverbials as well as markers of deference (*With the greatest respect, I beg to differ*, etc) were identified. However, the researchers have also found a high use of modal verbs. Hence, a corpus-based software Wordsmith tools was used to draw out the adverbs and the modals. In the case of the former. Figure 2 below illustrates the concordance of *Accordingly*.

N	Concordance	Set	Tag	Word #	t. #	os. %	#	os. %	#	os. %	File	%
1	three questions are all in the negative. Accordingly , I am satisfied that the			10,508	322	2%	0	9%	0	9%	t3si3\case 2.txt	99%
2	excluded legally relevant factor. [75] Accordingly , I am inclined to agree with			6,214	197	4%	0	9%	0	9%	t3si3\case 2.txt	60%
3	was that she was now a Christian. Accordingly , there is nothing in reg 4(cc)			5,855	183	8%	0	5%	0	5%	t3si3\case 2.txt	57%
4	word 'Islam' does not appear. I would accordingly grant her a declaration in			4,246	157	5%	0	6%	0	6%	t3si3\case 1.txt	96%
5	were amended in 1999. [63] 60 Accordingly , it is my considered			3,263	121	1%	0	4%	0	4%	t3si3\case 1.txt	74%
6	was that she was now a Christian. Accordingly , there is nothing in reg 4			3,043	115	0%	0	9%	0	9%	t3si3\case 1.txt	69%
7	as stated in her application form. Accordingly , the request for the order			2,724	102	0%	0	2%	0	2%	t3si3\case 1.txt	62%
8	the originating summons be amended accordingly ; (iii) that service of the			1,796	62	4%	0	1%	0	1%	t3si3\case 1.txt	42%
9	aforesaid advice of the said officer, I accordingly swore a further statutory			931	35	5%	0	1%	0	1%	t3si3\case 1.txt	22%
10	was that she was now a Christian. Accordingly , there was nothing in reg			135	4	9%	0	3%	0	3%	t3si3\case 1.txt	3%

FIGURE 2: Concordance of 'Accordingly'

As close reading revealed the use of modality, the next step was to elicit the modals used. However, as there were many occurrences for *would*, the researchers decided to focus only on those preceded by the first person, as in *I would*. This is because in a dissent, the judge would want to make his opinion very clear.

Concord												
File Edit View Compute Settings Windows Help												
N	Concordance	Set	Tag	Word #	t. #	os. #	. #	os. #	. #	os. #	File	%
1	the word 'Islam' does not appear. I would therefore [*637] direct the			10,562	324	6%	0	0%	0	0%	t3si3\case 2.txt	100%
2	establishing the merits of her appeal. I would therefore allow her appeal and			10,525	323	8%	0	9%	0	9%	t3si3\case 2.txt	99%
3	power as a source of jurisdiction would set an unhealthy trend. For			10,243	310	0%	0	7%	0	7%	t3si3\case 2.txt	97%
4	the third application as only NRD would have known of the impending			8,833	274	3%	0	3%	0	3%	t3si3\case 2.txt	84%
5	informed or given any notice that reg 4 would be amended. In my view there is			8,743	271	5%	0	3%	0	3%	t3si3\case 2.txt	83%
6	to the extra-legal policy. [92] Ninth, I would also say that in rejecting the			8,519	267	8%	0	0%	0	0%	t3si3\case 2.txt	81%
7	a certificate of apostasy when to do so would likely expose her to a range of			8,402	262	1%	0	9%	0	9%	t3si3\case 2.txt	80%
8	sense as described in CCSU case. I would say that NRD had unlawfully			8,115	252	9%	0	7%	0	7%	t3si3\case 2.txt	78%
9	qualified to decide. [83] With respect I would say that the majority judgment			7,494	232	1%	0	1%	0	1%	t3si3\case 2.txt	72%
10	Tribunal [1969] 1 All ER 208. I would say that there was an abuse of			7,312	230	3%	0	9%	0	9%	t3si3\case 2.txt	71%
11	produced an apostatisation order, there would have been no necessity for the			7,095	221	3%	0	7%	0	7%	t3si3\case 2.txt	69%
12	identity card came to be issued it would, while bearing the new name that			6,819	213	8%	0	4%	0	4%	t3si3\case 2.txt	66%
13	by the Islamic authorities. I would therefore think that in coming to			6,156	196	5%	0	8%	0	8%	t3si3\case 2.txt	60%
14	(xiii)' (sic) (to read reg 4(c)(x)). [74] I would add that NRD overlooked the point			5,947	187	9%	0	6%	0	6%	t3si3\case 2.txt	58%
15	exercised in accordance with law. I would once again emphasise what has			4,098	138	9%	0	9%	0	9%	t3si3\case 2.txt	40%
16	that she entertained fear that action would be taken against her by the			2,746	96	4%	0	6%	0	6%	t3si3\case 2.txt	27%
17	and that her change of name alone would be insufficient for her purposes.			2,061	71	8%	0	9%	0	9%	t3si3\case 2.txt	20%
18	informed by NRD that the Regulations would shortly be amended and that her			2,050	71	3%	0	9%	0	9%	t3si3\case 2.txt	20%
19	the status of law. [*620] [25] I would also say that the appeal before us			1,709	59	4%	0	6%	0	6%	t3si3\case 2.txt	17%
20	an apostatisation order, there would have been no necessity for the			751	25	4%	0	7%	0	7%	t3si3\case 2.txt	8%
21	the appellant has succeeded, I would make no order for costs here and			4,332	162	4%	0	8%	0	8%	t3si3\case 1.txt	98%
22	if it had been presented in simple terms would have caused no difficulty to			4,288	159	1%	0	7%	0	7%	t3si3\case 1.txt	97%
23	the word 'Islam' does not appear. I would accordingly grant her a declaration			4,245	157	2%	0	6%	0	6%	t3si3\case 1.txt	96%
24	bound by law to do the present problem would never have arisen. [*219]			4,182	153	1%	0	5%	0	5%	t3si3\case 1.txt	95%
25	the most proper and adequate remedy would be by writ of certiorari or			3,980	145	2%	0	0%	0	0%	t3si3\case 1.txt	91%
26	present instance the Director General would have been entitled to ask the			2,696	101	7%	0	1%	0	1%	t3si3\case 1.txt	62%
27	in the identity card. 8.5 — It would appear that the Second			1,266	48	6%	0	9%	0	9%	t3si3\case 1.txt	29%
28	informed me that if I did so, there would not be any difficulty in processing			902	34	0%	0	0%	0	0%	t3si3\case 1.txt	21%
29	was made, the present problem would never have arisen (see para 65).			396	11	5%	0	9%	0	9%	t3si3\case 1.txt	10%
30	An order from the Syariah Court would do nothing to support the			51	0	7%	0	1%	0	1%	t3si3\case 1.txt	1%
concordance collocates plot patterns clusters filenames source text notes												
30	Set	Case 2 - Microsoft Word										

FIGURE 3: Concordance of 'would'

DISCUSSION

The data collected for the three dissents are quite extensive but the style of presentation is different from that of the 80s and 90s. One of the differences is in the numbered paragraphs as opposed previously where the paragraphs were identified according to alphabets. As these reports are now available on line perhaps the typeface and single column is influenced by the current medium.

As the judges' opinions are now presented in numbered paragraphs, Gopal Sri Ram's dissent is in Para 21 to Para 70. In the Federal Court, Richard Malunjun's dissent is rather lengthy, from Para 21 to 109. In Zainun Ali's case, her dissent is from Para 46 to 238. In short, all the dissents are longer than the majority opinions.

Interestingly, however, only Zainun Ali's dissent was awarded a reply from Vincent Ng JCA. On closer examination, this is not a regular act for any jurisdiction, thus adding the merit for the selection of her opinion. It will also be interesting to see if she belongs to the female "Great Dissenters" as mentioned earlier.

In relation to the use of linguistic markers to demonstrate dissent, the following findings are revealed. Firstly, the data show an abundance of modality, adverbs, markers of deference as well as nominalizations to impute of lesser cognition and/ or ability.

MODALITY IN USE

The modals that are used generously here are *would*, *should*, *could* and *must*. Quirk, Leech and Startvik (1980) state that *would* has at least five different functions: willingness (weak volition), insistence, characteristic activity, hypothetical meaning in main clause and probability, but in the dissent where the judge said *I would* there is no denying that the function is that of insistence. Such an example is seen below;

Case 2, Para 83

With respect I would say that the majority judgment erred in considering an issue.....

In relation to the use of *should*, Quirk, Leech and Startvik (1980) state that there are at least four functions, namely obligation and logical necessity, putative use after certain expressions, hypothetical use (first person and especially British English) in the main clause with a conditional sub-clause, and tentative conditioning conditional clauses. The data reveal that the modal *should* functions mostly as obligation and logical necessity as shown below:

Case 1, Para71

So far as the Majlis Agama Islam, Wilayah Persekutuan (the Islamic Religious Council of the Federal Territory) is concerned, in my view it was wrongly joined as a party and should be struck out as should the Government of Malaysia.

Case 2, Para 22

Hence, it is thus my task to express my views and reasons on what I think should be the outcome of the appeal.

In both cases above, Gopal Sri Ram JCA and Richard Malujun FCA have used *should* to show that it is of utmost importance that their opinion be accepted due to their reading of the interpretation of the law.

On the employment of *could*, Quirk, Leech and Startvik (1980) state that it is employed to demonstrate three functions: ability, permission and probability. Let us turn to the data samples.

Case 2, Para 11

Thus the NRD could not call for documentary evidence that the appellant was or was not a Muslim.

Case 2, Para 80

Such an approach could only be correct if the history of the present appeal is omitted.

The analysis of *could* is rather interesting as the semantics of the modal has to be discerned from not only the propositions alone but must allude to the linguistic environment as

well. The nuances are rather close. In Para 11, *could* is used to show the lack of ability on the part of the NRD to call for documentary evidence of apostasy because the appellant had not submitted any evidence to show that she was not a Muslim.

In the case of Para 80, *could* is used to show the possibility of and in his case it alludes to the adoption of the approach taken by the majority of the coram in following an earlier case. The dissenting judge was of the opinion that the facts of the case were different and so the approach must also be different.

On the use of *must*, Quirk, Leech and Svartvik (1980) have shown that this modal has two functions; obligation and necessity. Again as in the case of the other modals, *must* has been used quite frequently. However, the determination of function has not been easy. However, from the linguistic environment, obligation is when the modal is followed by a negation as in *must + not*, while necessity is when the modal is followed by the copula 'be' as in *must + be*.

ADVERBS AND ADVERBIALS

As mentioned in the literature, dissent is very much represented by adverbs and adverbials. The data revealed the 33 adverbs employed of which among them are: *admirably, automatically, accordingly, broadly, correctly, deliberately, unfortunately, wrongly*, etc. Such a finding thus alludes to Trosborg's dominant markers in argumentation. Some of the examples from the data are as follows:

[74]I would therefore think that in coming to its decision to reject the application of the appellant on account of non-production of an order or a certificate of apostasy from the Federal Territory Syariah Court or Islamic authorities NRD had asked itself the wrong question and had taken legally irrelevant factor into account and excluded legally relevant factor.

[75] Accordingly I am inclined to agree with the submission of learned counsel for the appellant that 'in requiring...'

[79] With respect, the holding in the majority judgment of the Court of Appeal completely disregarded the fact that the appellant made several applications for a change of name

As mentioned in the literature review, Finegan (2010) stated that adverbials add to the content but adverbs do not, and hence *accordingly* in Para 75 is an adverb and *completely* in Para 79 is an adverbial.

MARKERS OF DEFERENCE AND APPEAL TO 'BRETHREN'

The data also reveal the use of expressions that show appeal to the brethren accompanied by deference. While this act has been extensively covered in Belleau and Johnson (2004), as well as other writers, it is rather surprising that in all three cases, only Richard Malunjun used them extensively. As examples, let us turn to the following:

Case 2, Para 19

I had the privilege of deliberating with their Lordships the learned Chief Justice and Mr. Justice Dato' Alauddin, FCJ on the draft judgment for this appeal.

Case 2, Para 20

With the greatest respect I am unable to concur with them on the final decision of this appeal. Hence, it is thus my task to express my views and reasons on what I think should be the outcome of this appeal.

Case 2, Para 71

With respect, I am unable to agree with the majority judgment of the Court of Appeal and the submission of the learned Senior Federal counsel. I think the minority judgment of the Court of Appeal took the correct approach in the construction of those Regulations when it said this:...

It is rather interesting that despite his strong views, this FCA judge stood his ground and remained composed and civil in his dissent. He did not resort to any negative insinuations though the researchers believe that sharing the same religious faith as the appellant and hearing this apostasy case, it must have been difficult to see the law interpreted the way it was. Hence, much of FCA's intertextual references were to the rule of law and the Federal Constitution. This is unequivocally described in Para 23 and 24, his preliminary findings as reproduced below:

[23] Sworn to uphold the Federal Constitution (the Constitution), it is my task to ensure that it is upheld at all times by giving effects to what I think the founding Fathers of this great nation had in mind when they framed this sacred document.

[24] It is therefore my view that when considering an issue of constitutional importance it is vital to bear in mind that all other interests and feelings, personal or otherwise, should give way and assume only a secondary role if at all...

Having stated his caveat, Richard Malunjun FCA then explained his positioning and intent as a judge within multiracial and multi religious Malaysia, aware of the bigger picture and the need for law to maintain order in the country and hence we note the following:

25] I would also say that the appeal before us is indeed not easy to resolve for it involves issues of critical importance in the hearts and minds of the people in this country. Cursory handling may result in unnecessary anxieties to the general public. Thus, intensive discussions and research works had to be done with great patience and sincerity before any conclusion could be made.

Hence, there are instances when ideological stance needs to be 'masked' because a judge needs to be impartial and be seen to be impartial (Chan 2007). Likewise, the majority judges may have also been rather concerned with their argumentation as they had to deal with the same issues, albeit from a different point, amidst the growing sentiments that were brewing outside the courtroom at that time. In short, both sides, the majority and the dissenting, practice civility among themselves, which according to Lebovits (2006) and Chan (2007) are the markers of a judge, who knows his craft. Hence, by demonstrating civility on the bench notably at the hierarchy of law-making, the judges show that they are conscious of their role in the legal world.

What is also interesting about this dissent is that apart from intertextual references that are beyond the scope of this paper, there are also inclusions of verbs choices that are rather strong. For instance in Para 76, he said, "The majority judgment of the Court of Appeal *circumvented the above* by holding thus..."

IMPUTATIONS OF INCOMPETENCE

In the discussion on FCA Richard Malunjun's dissent above, we note how the judge maintained decorum and civility in difficult situations. However, maintaining civility is not always the

case. In our third case, Zainun JCA demonstrates how judges do not always temper their emotive tone and do not employ subtlety in their judgment.

A close analysis shows her disagreement not with the majority directly, but with the trial judge and so imputations of incompetence were executed with the use of sarcasm and derogatory nouns as reproduced from her preliminary findings. The sarcasm in Para 82 and the use of derogatory terms as *hogwash* in para 83 attest to this.

[82] In any case, after a *thorough analysis of the evidence before him*, the learned judge found that the defendant had failed on a balance of probabilities, to defend the plaintiff's claim of defamation. The learned judge granted the plaintiff's claim and ordered damages as are found in his order.

[83] So there you have it. In my view the entire claim of the plaintiff is merely *hogwash and* is thus untenable. And it must fail. My reasons are as follows.

Further analysis reveals that that this female judge had allowed herself to employ a rather hostile and contentious tone as well as legally serious imputations like 'misdirections in law' (Para 181), 'glossed over the fact', etc. What is interesting ideologically is when a comparison is made between Cases 1 and 2 with case 3, there is marked difference in judicial and linguistic behavior. But this cannot be alluded to gender because of the small sample nor can it be alluded to issues. It would be interesting however, to engage in a bigger corpus of data from the dissent of Zainun Ali JCA to see if this is her craft and if this is her ideology of a dissent.

For her dissent, Zainun Ali JCA was awarded a reply by Vincent Ng JCA who tempered it with the following:

Vincent Ng JCA: (a reply):

[239] After having read the grounds of judgment of my learned brother, James Foong Cheng Yuen JCA and the views in brief of my learned sister Zainun Ali JCA, I wish to now state my considered views in the following manner.

In short, the majority had indeed alluded to an appeal of brethren and measured tone to reply to the hostile dissent. In this manner, the public's confidence in the judiciary is maintained as the case will be read and re-read by litigants and the public.

CONCLUSION

The heart of a judge's reputation and function rests with the use of the pen. While judges are to remain impartial so that justice can be served, judges may not be emotion free, and this may manifest in their opinion. We note however, that in cases of national interest (as per Lina Joy), judges take extreme pains not to cause anxiety in their selection of words in dissenting (as per Richard Malunjun) but ideologically did he on the one hand, and the majority on the other, act in the name of the law or in the name of the religion that they profess?

It is interesting thus to witness the use of modals to display strong volition, and of an uncommon practice, the use of derogatory nouns to show displeasure not at all tempered with

subtlety. It is interesting to see if the more recent cases show a tendency to minimize deference especially at the Court of Appeal. So the question is, are Malaysian judges moving away from the trend of the English judges in prose, style and temperament? As this study is limited in corpus, the findings are inconclusive but they pave the way forward.

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